

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN BILL TASH**, on January 8, 1999 at 3:00 P.M., in Room 437 Capitol.

ROLL CALL

Members Present:

Rep. Bill Tash, Chairman (R)
Rep. Hal Harper, Vice Chairman (D)
Rep. Cindy Younkin, Vice Chairman (R)
Rep. Rod Bitney (R)
Rep. Aubyn A. Curtiss (R)
Rep. Rick Dale (R)
Rep. Bill Eggers (D)
Rep. Ron Erickson (D)
Rep. David Ewer (D)
Rep. Gail Gutsche (D)
Rep. Joan Hurdle (D)
Rep. Dan McGee (R)
Rep. Douglas Mood (R)
Rep. Karl Ohs (R)
Rep. Scott J. Orr (R)
Rep. Bob Raney (D)
Rep. Bob Story (R)
Rep. Jay Stovall (R)
Rep. Carley Tuss (D)
Rep. Doug Wagner (R)

Members Excused: None.

Members Absent: None.

Staff Present: Deb Thompson, Committee Secretary
Kathleen Williams, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearings & Date Posted: HB 29, HB 95
Executive Action: January 5, 1999

HEARING ON HOUSE BILL 29

Sponsor: Rep. Karl Ohs, HD 33, presented HB 29. He explained this bill would allow for an increase on the bonding authority for the Resource Indemnity Trust up to \$20 million. This would encourage economic development for agriculture, making loans available for irrigation projects for the purpose of crop diversification.

Proponents: Ray Beck, representing Department of Natural Resources loan program, discussed the increased need for the loan program for irrigation companies. He pointed out the program did not compete with banks and the program was the only funding source for these types of loans. He presented written testimony from Ralph Peck, Director of the Montana Department of Agriculture **EXHIBIT (nah05a01)**.

Mike Volesky, representing the Montana Association of Conservation Districts, spoke about the importance of improvements in water quality in those districts.

Opponents: Mike Barrett, representing himself as a poet and philosopher, spoke against the way the bill would spend money. He expressed his opinions regarding orderly systems and the disturbance in climatic trends **EXHIBIT (nah05a02)**.

Questions from Committee Members and Responses: Rep. Ewer asked about the status of the fiscal note. **{Tape : 1; Side : A; Approx. Time Counter : 13.2}** John Tubbs, DNRC, replied this would allow the program to continue to issue loans for the water development program. He pointed out this was not subsidizing but instead made market rate loans available. Rep. Ewer noted this was a general obligation bond which was an enhancement to the program because of the lower cost of capital.

Rep. Mood asked if this program was coordinated with the issue of doubling the irrigated acres in the state. Rep. Ohs replied this was not included with the Jobs and Income bills but would be needed to help facilitate increasing irrigated acres.

Rep. Raney asked Mr. Beck about the mechanics regarding issuing bonding authority to back the loans. Beck replied a 2/3 vote was need to appropriate the money but there was no cost to the state. Defaults are covered by excess payments from loans that were paid early. The Coal Tax backs the bonds.

Closing by Sponsor: Rep. Ohs asked the committee to look at the economic development advantages. He said not only was this more efficient but a better use of water. This program is successful and beneficial to those upgrading their systems.

HEARING ON HOUSE BILL 95

Sponsor: Rep. Bob Story, HD 24, presented HB 95. The bill would update sections in the law, specifically defining the word "appropriate".

Proponents: Jack Shults, Administrator of the Water Resources Division, discussed the bill. *{Tape : 1; Side : A; Approx. Time Counter : 22.8-36.1}* He said this bill covered general changes to the statute which govern how DNRC covers the water rights statute. **EXHIBIT(nah05a03)** He explained "appropriate" was a fundamental term within the law. He said the bill did not alter existing policy. He distributed the Water Rights in Montana booklet. **EXHIBIT(nah05a04)**

John Metropolis, attorney in Helena representing the Flathead Joint Board of Control, the central operating authority for three irrigation districts located on the Flathead Reservation, presented his viewpoint. He explained there are 113 thousand acres within their boundary of irrigated lands and another 14 thousand acres outside the boundary served by the irrigation project. He spoke in support of the bill for the purpose of clarification. He pointed out the word "appropriate" does not recognize the legal fact that individuals can also hold non-Indian or Indian reserved water rights or a portion thereof.

Opponents: George Heavy Runner, representing the Blackfoot Tribal Business Council, spoke in opposition to the bill. He explained the Blackfoot Tribe possess significant water rights in Montana. The Blackfoot were involved in negotiations with the Water Rights Compact Commission which would put into question the intentions of the state. **EXHIBIT(nah05a05)** He said their water rights were unique under federal law not state law.

George Ochenski, representing the Salish Kootenai Tribe, spoke against the bill. **EXHIBIT(nah05a06)** The two classes of water rights, the aboriginal rights and the federal reserved water rights, do not rely on State law for their existence. "Appropriation" creates weakness in the law regarding the uniqueness of Indian rights.

Rep. Carol Juneau spoke against the bill. She has the Blackfeet Reservation in her district and support the tribes opposition.

Questions from Committee Members and Responses: Rep. Harper asked Don MacIntyre **{Tape : 1; Side : A; Approx. Time Counter : 51.7}** whether or not the amendment was critical since it appeared to jeopardize cooperation with the tribe. MacIntyre replied that one of the issues raised by the Salish Kootenai Tribe in a court case, where it provided that a holder of an existing right, a prior appropriator, if their right is being adversely affected they can be an objector in the permitting of a new permit in Montana. The Tribe argued that in the State of Montana the term "appropriate" does not include federal Indian and non-Indian reserved water rights they did not fall within the class of prior appropriator. MacIntyre stated, what is being said is "we don't want the State of Montana issuing permits - period", when it comes to federal reserved rights when the tribes are objectors.

Rep. Mood **{Tape : 1; Side : A; Approx. Time Counter : 55.5-58.5}** asked for clarification. He asked if the tribes possessed absolute water rights how could the state permit some of their rights. MacIntyre replied, appropriation in regards to water rights means take the water, such as putting it to a beneficial use. Federal Reserved Rights or Aboriginal Rights are clearly recognized in both federal government agencies and with the Tribes. They can hold the water for in-stream purposes, where there is no diversion or appropriation. What the state has said since it passed the water use act is the term "prior appropriator", which is generally thought to be the person who has the water right, includes those who have in-stream flows which would include the Tribes. There was a general understanding that the Tribes were prior appropriators. However, when they raised the issue in their legal arguments before the Supreme Court because this definition does not include them, they are not a prior appropriator under Montana statute. This is only trying to put them back in there so it is clear that they are prior appropriators, not trying to assert jurisdiction over the Tribes and their rights.

Rep. Mood asked Mr. Heavy Runner to respond. Heavy Runner replied it was in the "eyes of the believer". He noted it was interesting how MacIntyre had talked about the correlation of the amendment with the timeliness to the Supreme Court issue right now. He pointed out the importance of waiting for the court decision before circumventing or try to fix something with respect to this issue.

Rep. Younkin asked Mr. MacIntyre what the practical effect of adding the definition of "appropriate" was in regards to a downstream permit applicant. MacIntyre replied if an applicant doesn't have to prove adverse affect to a reserved right then the Tribe has no standing before the agency. Rep. Younkin asked if

this would give the holder of that water right standing to object to the downstream permit application. MacIntyre said under the argument they made before the Supreme Court this law would have to be this way before they could be considered a prior appropriator. He said this question was one of the issues before the Supreme Court.

{Tape : 1; Side : B; Approx. Time Counter : 1.6}

Rep. Stovall asked what DNRC's purpose was in submitting the amendment at this time. Shults replied the timing was coincidental. The reason for putting this in now was in direct response to statements of concern by the tribe regarding ambiguity that appeared to lessen their standing in the process. The goal was to strengthen their standing and make the issue explicitly clear when you apply for water rights in the State.

Rep. Eggers asked if there was a federal preemption issue here and if this clause implied that the State had jurisdiction over the subject matter. MacIntyre replied it was not a question of federal preemption and the State was not attempting to gain jurisdiction or regulation over a tribal entity. This is simply a recognition in state law that a reserved water right held by a federal entity is recognized in state law so in the permitting process, an applicant has to take that into account when they seek either a permit or a change. **{Tape : 1; Side : B; Approx. Time Counter : 8.8}**

Rep. Eggers said the inclusion of the clause carried an implication that the State has jurisdiction over the subject matter. MacIntyre replied the State has jurisdiction over water resources of the State of Montana and with respect to adjudication of those rights the State of Montana has the jurisdiction to determine quantification of those rights within state courts. In terms of the administration of the water rights, that is not as clear. Once the adjudication is complete, if the water is not being used, it is subject to appropriation but subordinate to a federal right. If there are surplus waters within the exterior boundaries after adjudication is complete the State of Montana has jurisdiction over those waters.

Rep. McGee asked if federal land, such as Glacier Park, had prior reserved federal water rights. MacIntyre replied this was talking about reservations created by federal law, such as the national park. In that creation, the law does recognize that there are implied water rights. The date of that reservation is the date of that right. Rep. McGee pointed out lines 24-25 "in case of a federal agency or Indian Tribe". He asked what would happen if the American Heritage Rivers Act identified the Yellowstone River from its source into the Missouri River as the

American Heritage River corridor so that all the drainages were included, what would happen to the water rights with this definition. MacIntyre replied we would continue to have senior rights and would continue to exercise that right unless Congress explicitly created a right and condemned particular rights and that would need to be compensated. He clarified that this language was for purposes of the water use act. It does not create water rights for anyone but simply recognizes that the right exists. The person holding it is considered to be a prior appropriator.

Rep. Erickson pointed out, referencing section 3 #6 language, that the tribes have standing without adding the first page, where the new definition was not needed in order to have standing. MacIntyre said that was true but the issue of page one was the criteria section of the law. The tribe had argued that they were not a prior appropriator so they would not be able to raise adverse effect tests to their water rights in a permit preceding.

Rep. Harper **{Tape : 1; Side : B; Approx. Time Counter : 14.8}** clarified that to define the tribe as prior appropriators would mean that they would have to be involved as objectors in this process so that new appropriation being sought could go through. Harper asked if this meant that the tribes felt they do not have to immediately object and become involved in the process since they have an appropriation of a different level and they should maintain that standing regardless of what the State does. He noted that it appeared, with this change in the law, they would be forced into objecting or they would lose their standing and only gain it when all these reserved water rights are finally solved.

MacIntyre replied the short answer was no. **{Tape : 1; Side : B; Approx. Time Counter : 18.9}** He explained the State of Montana had created a process for acquiring permits that allows objectors to provide information as to why the rights should not be granted. He clarified with respect to the reserved water rights, those held specifically by the tribes, the tribes would file what is called a jurisdictional objection saying they have the water rights and they will not go through the objection process. However, the argument they made and the reason they do not want to come into this process, is because they believe they would be subjecting their rights to adjudication in an administrative form. The Department of Natural Resources and all the McCarren amendment does is subject it to the State form. The difference in legal positions is that the State takes the position there is no adjudication in a permitting process. The only place you can adjudicate water rights is in the courts. The administrative

process is a process that is forward looking to try and help people. This says before you can get a water right you have to go through a process to try and establish that you are not injuring other senior users. The amendment does not force the tribes to come in it simply reacts to their constitutional argument. The law protects the tribes just like any other senior water user.

Rep. Harper questioned whether in-stream flow was an appropriation in all cases whether impounding, diverting or drawing water. MacIntyre replied that in-stream flow under Montana law as it currently exists, is an appropriation. He stated that the hole that was left was federal rights were created under state law. It is an all encompassing law that says no matter what kind of right you hold, federal or created under state law, whether it has diversion for beneficial use or whether it is in-stream for beneficial use, everybody is protected the same as a holder of an existing water right.

Closing by Sponsor: Rep. Story closed. He said it was a complex issue and should be talked over before executive action.

ADJOURNMENT

Adjournment: 4:25 P.M.

REP. BILL TASH, Chairman

DEB THOMPSON, Secretary

BT/DT

EXHIBIT (nah05aad)